Filed 2/15/11 In re J.E. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re J.E. et al., Persons Coming Under the Juvenile Court Law.	B225389 Super. Ct. No. CK69346) (Los Angeles County
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ` GABRIELLA F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Valerie Skeba, Temporary Judge.* Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

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* Pursuant to California Constitution, article VI, section 21.

In this dependency case (Welf. & Inst. Code, § 300 et seq.),[1] Gabriela F., the mother of dependent children Jeremiah E. and Maximus E. (Mother, Jeremiah, and Maximus, respectively), challenges the dependency court's decision to deny her family reunification services with the children. Denial of services was based on section 361.5, subdivision (b) (10).[2] Mother contends the evidence shows she made a reasonable effort to treat the substance abuse problem that led to the court having previously removed her other two children from her care. However, from our examination of the appellate record we find substantial evidence to support the trial court's decision. Therefore, we will affirm the challenged order.

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[1] Unless otherwise indicated, all references herein to statutes are to the Welfare and Institutions Code.

[2] In its respective subsections, subdivision (b) of section 361.5, sets out various circumstances in which reunification services "need not be provided to a parent or guardian" when the dependency court makes a finding by clear and convincing evidence that the circumstances exist. Thus when such a finding is made, " 'the general rule favoring reunification is replaced by a legislative assumption that offering [reunification] services would be an unwise use of governmental resources.' [Citations.]" (*K.C. v. Superior Court* (2010) 182 Cal.App.4th 1388, 1393.)

Subdivision (b) (10) of section 361.5 provides that "[r]eunification services need not be provided to a parent or guardian" if the dependency court finds by clear and convincing evidence that "the court ordered termination of reunification services for any siblings or half siblings of the [subject] child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian."

BACKGROUND OF THE CASE

1. *Detention of the Minors*

Jeremiah (born January 2009) and Maximus (born December 2009), came to the attention of children's social worker Anne Thomas at the Los Angeles County Department of Children and Family Services (the Department) on February 26, 2010, when she received an immediate response referral alleging the general neglect of Maximus by his parents and alleging that Jeremiah was at risk for neglect. Specifically, the caller related that Maximus was born prematurely at 29 weeks, he had spent 47 days in the hospital after birth in the neonatal intensive care unit, and his parents had only visited him three times when he was there.[3] Additionally, the vessels in the back of both of Maximus's eyes did not fully develop before he was born, and although his parents had been given specific instructions when he was discharged from the hospital to take him to the office of an ophthalmologist (pediatric retinal specialist) for assessment of whether he would need surgery, and indeed they had been told that he could go blind without treatment, the parents failed to take the child for care. Beginning the day after Maximus was discharged from the hospital the ophthalmologist's office

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[3] The parents told the hospital social worker they only visited Maximus three times because they had flu. The hospital social worker did not believe them. He opined that "it is extremely unlikely that the parents had the flu for 43 days."

began attempting to contact the child's parents by telephone (five phone calls, leaving messages) and by letter but with no success.[4]

Upon receiving the immediate response referral, social worker Thomas reviewed the Department's records and discovered that on June 15, 2009, the dependency court had terminated Mother's parental rights to her two other children, Nathan F. and Aaron F., because of Mother's untreated substance abuse, including cocaine. Thomas also learned that on the day Maximus was born the Department received a referral regarding him because Mother had a lengthy substance abuse history and had reported only having three prenatal appointments during her pregnancy with Maximus. However, Mother's toxicology screen was negative when Maximus was born, and after investigating the referral received on the date of his birth, including finding that the baby's toxicology screen was negative, the Department concluded that although the

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[4] The appellate record contains a written "NICU Discharge Follow-Ups" instruction for Maximus. It is dated January 26, 2010, and bears a nondecipherable signature on the line entitled "(parent/conservator/guardian)." It states the baby was to be seen by a pediatrician in 48 hours and by the pediatric ophthalmologist in two weeks. What appears to be an additional page for the discharge states the ophthalmologist's name and has a written notation "2 weeks." However, the Department's detention and jurisdiction/disposition reports indicate that Maximum was supposed to be taken to see the ophthalmologist on January 29, 2010, the day after he was discharged from the hospital. A pediatric social worker at the hospital told the Department that both he and the ophthalmologist told Maximus's parents that they must follow up the next day with the ophthalmologist to assess if Maximus needed surgery. By "next day," the hospital social worker apparently meant the day after Maximus was released from the hospital. The Department's jurisdiction/disposition report states that when the Department social worker questioned Mother about the required ophthalmologist visit, Mother stated she had been told by a nurse to make the appointment for two weeks later. Asked why she had not scheduled an appointment Mother stated she had no phone and no car, and "it was downtown. I was trying to get into a clinic that was near me."

allegation of caretaker absence/incapacity regarding the baby was unfounded, nevertheless there was a high enough risk of abuse and neglect so as to recommend that the family participate in 6 months of in-home services. The December 12, 2009 referral was closed. By the time Department social worker Thomas received the February 26, 2010 immediate response referral, Mother had not signed up for the recommended in-home services.

After Thomas reviewed the Department's records she went to the family home three times in an attempt to have a home visit and then learned the family had moved. She went to the new residence on March 3, 2010, at approximately noon. She found Mother and the minors at home and there were other adults there. Jeremiah and Maximus were dirty and were wearing dirty clothes. Thomas observed beer bottles and an empty brandy bottle in the home. Mother initially denied that she had been drinking that morning and said it was the other adults who were consuming alcohol, but then she stated she had consumed one drink. Mother acknowledged she had been told that Maximus could go blind without medical care but when asked why she had not taken the baby to the ophthalmologist, Mother gave Thomas many excuses. In her written report, Thomas opined that essentially the excuses indicated Mother was a very busy person. Asked about the minors' respective fathers, Mother stated she did not know their whereabouts. Thomas determined that Mother was under the influence of alcohol during the home visit and there were multiple adults in the home who were also drinking. The minors were taken into protective custody by the Department that same

day and placed in a foster home. The social worker observed that Jeremiah "separated easily from his mother."

Two days after Thomas detained the children, Mother told the social worker that Maximus's father, Jose E., had thrown objects at her while she was holding the child. On another date she told the social worker the objects were a plate and a cup. She did not make a police report. She told the social worker that she had used cocaine on or about March 1, 2010, and she used it because she was with Maximus's father. She stated that she "relapse[s] with him." She also stated that Jose E. likes to drink, begins drinking in the morning and drinks all day, likes to use cocaine when drinking, "gets physical when he drinks," and "[i]f he doesn't drink he gets sick."[5] Mother tested positive for cocaine on March 4, 2010.[6]

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[5] The Department's jurisdiction/disposition report states that Jose E. was then-currently incarcerated as a result of his domestic violence against Mother that occurred on March 31, 2010. A police report states he hit Mother in the face when she refused to have sex with him. Mother told the social worker that the assault on her left the side of her face (cheek, eye area, mouth) bruised, and it occurred when she happened to run into Jose E. on the street. She stated he was drunk. The social worker observed bruising on Mother's cheek.

[6] The Department's jurisdiction/disposition report states that a CLETS check showed Mother has a criminal record, which includes but is not limited to, a conviction in April 2007 under the Health and Safety Code for possession of a narcotic controlled substance. The report states the criminal court granted Mother drug treatment and on September 8, 2009, the court "found judgment term-successful." Maximus was born three months later.

The jurisdiction/disposition report also states Mother told the Department on April 8, 2010, that she *surrendered to authorities on April 2, 2010*, on a warrant that had been issued as a result of a DUI arrest on January 16, 2010. Mother told the social worker she spent three days in jail because she could not afford to pay restitution. The Department's CLETS check indicated there was an arrest on January 15, 2010, for DUI

Maximus and Jeremiah were detained by the dependency court on March 8, 2010. Mother was given monitored visitation.

2. *Pre-Disposition Hearing Events*

Maximus was examined by the ophthalmologist on March 6, 2010. On March 29, 2010, the Department learned he had been hospitalized since March 19 and would remain in the hospital for another four days. Then, he was admitted to the USC Medical Center on April 6 because of E Coli and possible meningitis. Meningitis was ruled out and he was released from the medical center on April 9. The foster mother reported she could not handle all of the Maximus's numerous health issues and medical appointments and so on April 12, 2010, the Department replaced the minors to the home of their maternal grandmother and maternal aunt (MGM, MA, respectively), who had been granted unmonitored visits with the minors on March 19. Mother's two other children, Nathan F. and Aaron F., were already in their care and they were in the process of adopting those children. Adoption was expected to be finalized in June 2010. When the MGM and MA were first contacted by the Department about Maximus and Jeremiah they stated they did not know that Mother had children besides Nathan and Aaron. The MGM stated she had not seen Mother since 2007.

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alcohol/drugs. This information from Mother about her surrender date is impacted by Mother's testimony at the June 7, 2010 disposition hearing concerning a Los Angeles County Sheriff's Department record. The sheriff's record states Mother was arrested on March 26, 2010, on a charge of "drunk driving .10 or above." As noted *infra*, Mother explained the sheriff's report by saying she was arrested on January 15, 2010 on a DUI charge and the sheriff's record of an arrest date of March 26 is "the same arrest" because she "told them" she would *surrender on March 26*.

Mother was visiting with the minors three hours per week, at a foster agency. No problems or concerns were reported concerning the visits. She enrolled in a one-year substance abuse program at El Proyecto del Barrio on March 10, 2010. Her program included groups five days a week—12-step, relapse prevention, parenting, anger management, health education, domestic violence, and self-esteem. The program also included individual counseling, random urinalysis testing, two Saturday family interaction activities each month, three 12-step NA/AA meetings each week and a requirement that she obtain a sponsor. She tested negative for drugs and alcohol on April 6.

Mediation of the allegations against Mother was held on May 17. Mother pleaded no contest to section 300, subdivision (b) and (j) allegations as amended, and the court sustained those allegations by a preponderance of the evidence.[7]

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[7] The sustained b-1 and j-1 allegations include that Mother failed to timely obtain the necessary medical treatment from the pediatric ophthalmologist for Maximus's retinal eye condition and thereby has placed the minor at risk of blindness and placed Jeremiah at risk of harm. The sustained b-2 allegation is that Mother has a history of unresolved substance abuse including abuse of cocaine and alcohol which periodically limits her ability to provide regular care for the minors; on March 3, 2010, she was under the influence of alcohol while the minors were in her care and supervision; her substance abuse places the minors at risk of harm; and the minors' siblings, Nathan F. and Aaron F., received permanent placement services due to Mother's substance abuse. The sustained b-5 allegation is that Mother and Jose E. have engaged in violent altercations in which Jose E. physically assaulted Mother; Jose E. threw objects at Mother while she was holding Maximus; and Jose E.'s violence against Mother endangers the minors' physical and emotional health and safety.

3. *Disposition and Denial of Reunification Services*

By the time of the June 7, 2010 disposition hearing Mother had changed substance abuse programs several times, tested negative on May 10 and May 28, and tested positive for cocaine on June 1. As indicated in footnote 6, the Department learned she also had been arrested and jailed for driving with an alcohol count of .10 or higher.

Regarding the abuse programs, as noted above Mother's first program was El Proyecto del Barrio, where she enrolled on March 10, 2010. A letter from the Angel Step Inn program, dated May 11, 2010, states Mother transferred to that program on April 17 and was "safety transferred out" on May 11. It states that Angel Step Inn is a "45-day emergency shelter for women and/or their children whose lives have been disrupted by domestic violence and substance abuse" and is a "structured program." The letter states Mother complied with the rules and program requirements regarding domestic violence and chemical dependency, participated in all of the program activities, and was an example to her peers there.[8] The Department report states Mother next enrolled in an in-patient drug and alcohol program at Foley House on May 11, and left that program the very next day, and she told a social worker she planned on entering another program and enrolling in parenting classes. A June 7 letter from El Proyecto del Barrio states Mother came back to that program on May 28, 2010.

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[8] The record does not appear to state why Mother entered the Angel Step Inn program. If her entry was because of the physical violence against her by Jose E., Mother does not so state in her appellate briefs.

Mother was 33 years old at the time of the disposition hearing on June 7, 2010. In her testimony she acknowledged that she had never been in a substance abuse rehabilitation program until she entered El Proyecto del Barrio. She stated she was still participating in that program. Asked why her parental rights to Nathan and Aaron were terminated, she stated it was because she "didn't show up to court."

Asked about the various programs she has been in since Maximus and Jeremiah were detained from her care, Mother testified El Proyecto del Barrio is an outpatient program, and Angel Step Inn is inpatient. She stated she was transferred from Angel Step Inn to Foley House because a woman who entered the Angel Step Inn program was from the same area in which Mother's abuser, Jose E., lives. She did not ask to be transferred, and she only stayed at Foley House one day. She stated she was never closed out of the El Proyecto del Barrio program when she left there to go to the domestic violence program and she returned to El Proyecto del Barrio on May 27 or 28.

She estimated she has had a substance abuse problem for four years "off and on," and the abuse is with cocaine and alcohol. Asked why she tested positive on June 1 for cocaine, Mother stated it was because she was "just going through a lot of stuff right now. And I just relapsed. It was a one-time thing." She stated she would have a sponsor assigned to her at a meeting that night (the night of the disposition hearing). Asked if she had taken steps prior to her June 1 cocaine-positive test to prevent using cocaine, Mother stated she had "been trying to stay away from people who use or drink" but "unfortunately, I was at a place where there was, you know -- so I couldn't – I didn't

know how to say ‘no.’ And, unfortunately, I don’t have a cell phone where I can call because I have numbers for females.”

She stated her use of the cocaine occurred at a party and the reasons she went to the party was because she did not know there would be drugs or alcohol there because it was a children’s party but after the children’s party the adults had a party and she could not ask the person who brought her to the party to take her home because he had been drinking “ever since we got to the party” and so he was under the influence of alcohol. She stated that she would not put herself in a similar position again because she intended “to ask questions before I go anywhere.” She stated she was on probation for driving under the influence when she went to the party.

Asked what had changed for her between when she went to the party and the date of the hearing, Mother stated the difference was that she knows she “messed up” and she “shouldn’t have gone” and she didn’t “want to do it again because I don’t want to risk losing my kids.” She stated she would stay in her program even if the court did not order reunification services for her and she would be willing to enter an inpatient program if required.

When she was asked if she had any relapses since she entered the El Proyecto del Barrio program in March other than the positive test for cocaine on June 1, Mother stated there had been no other relapses and that included abstaining from alcohol. When she was shown the March 26, 2010 arrest record for the .10 or higher blood alcohol charge, Mother stated that the date of March 26 was “when I turned myself in.” She stated she was actually arrested on January 15, 2010 for that charge and was

released. She stated the March 26 arrest was "the same arrest" and she stated: "I told them that I would surrender on the 26th. And that way I could pay up for the community service and all that all together, and the 48 hours they were going to give me for the D.U.I." She stated she went to the Van Nuys court to surrender herself. She stated her program, El Proyecto del Barrio, was "okay with it" because she surrendered on a Friday and was released on a Sunday and that way she did not miss any classes.

The trial court found that Mother had not tried to stay sober, had "bounc[ed] around, going from program to program," and even though she had been on notice that the dependency court would be examining her efforts to address substance abuse, six days before the disposition hearing she had a positive test for cocaine. Moreover, she did not have the insight to not go to the party, and she had been arrested on alcohol charges. In denying Mother reunification services under section 361.5, subdivision (b)(10), the court stated it could not find that Mother had made a reasonable effort to address the substance abuse issues that caused the dependency court to terminate her reunification services with Nathan and Aaron, and could not find that reunification services would be in the best interests of Jeremiah and Maximus. The court declared the minors dependents of the court, and removed them from Mother's custody. The court suggested that if Mother were to stay in one program and consistently test clean at that program then the court would consider a section 388 petition regarding reunification services.

DISCUSSION

When determining whether a parent should be denied reunification services under section 361.5, subdivision (b) (10), a dependency court should not equate (1) the Legislature's requirement that the parent have made a "reasonable effort to treat the problems that led to removal of the sibling or half-sibling" of a child from the parent's care with (2) the parent's success or failure in overcoming the problems. Reasonable effort is not synonymous with the parent's problems having been cured, and thus the fact that a parent has not eliminated the problems that led to the removal of the subject child's sibling or half-sibling does not preclude a dependency court from finding that the parent made a reasonable effort to treat them. (*In re Albert T.* (2006) 144 Cal.App.4th 207, 221.) Moreover, even if a finding of no reasonable effort is made, the court still has discretion to afford the parent reunification services if it finds, by clear and convincing evidence, that reunification would be in the best interests of the child. (§ 361.5, subd. (c)); *In re Albert T.*, *supra*, 144 Cal.App.4th at p. 218, fn. 5.)

Orders denying reunification services under section 361.5 are reviewed under the substantial evidence test. "When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing evidence, the reviewing court must determine if there is any substantial evidence—that is, evidence which is reasonable, credible and of solid value—to support the conclusion of the trier of fact. [Citations.] In making this determination, we recognize that all conflicts [in the evidence] are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. [Citations.]

The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. [Citation.]" (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) Thus, the appellate record is examined in the light most favorable to the dependency court's findings and conclusions. (*In re Albert T., supra,* 144 Cal.App.4th at p. 216.) Nevertheless, substantial evidence is not the same thing as "any evidence." When a trial court's " 'decision [is] supported by a mere scintilla of evidence [it] need not be affirmed on appeal. [Citation.] Furthermore, "[w]hile substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." [Citation.]' " (*Id.* at pp. 216-217, italics omitted.)

In the instant case, there is substantial evidence that Mother did not make a reasonable effort by the time of the disposition hearing to treat her substance abuse problem. Her assertion on appeal that "[b]etween March and June 2010 [she] worked diligently to overcome her substance abuse" speaks to only a small segment of time and ignores many facts of the case.

The dependency court terminated her parental rights to Nathan and Aaron in June 2009 because of her untreated substance abuse, yet despite having five-month-old Jeremiah in her care at that time, by her own admission she did not begin to make an effort to treat her abuse problem. Certainly she must have realized that her parental rights regarding Jeremiah might be the subject of a future dependency review. Nor did she begin to make an effort to treat her abuse problem when Maximus was born. She also did not sign up for the voluntary in-home services offered to her by the

Department. She continued to be in the company of Maximus's father even though by her own admission she relapses into drug use when she is with him. She let nearly nine months lapse after having her parental rights terminated before she entered the El Proyecto del Barrio program, and she only did that after Jeremiah and Maximus had been detained by the Department and the dependency court. Additionally, on the day the social worker came to her home to see about the minors, she was found to be under the influence of alcohol while caring for the children, she was convicted of at least one alcohol related driving offense, and she twice tested positive for cocaine after Maximus and Jeremiah were detained by the Department, including a positive test just six days before the disposition hearing. Moreover, after her one-day stay at Foley House she let two weeks go by before she resumed treatment at El Proyecto del Barrio.

Nor can we find that the trial court abused its discretion when it did not find that it would be in the minors' best interests to order reunification services despite Mother's lack of a reasonable effort to treat her substance abuse problem. Asked at the disposition hearing why her parental rights were terminated as to Nathan and Aaron, Mother stated it was because she failed to make a court appearance. Clearly she was in denial concerning the consequences that her substance abuse can have.

DISPOSITION

The order from which Mother has appealed is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.